

network exemption. Indeed, the most straightforward means of ensuring that the imposition of channel occupancy limits does not deter investment in local programming is to apply the channel occupancy limit only to programming services that are distributed nationally.

The Further Notice also raises the issue of the applicability of the channel occupancy limits to pay-per-view services.⁵¹ Just as the Commission has recognized that a distinction should be drawn between national networks and local or regional services, so too should the Commission draw a distinction between full-time services and pay-per-view channels. The Commission, however, has thus far refused to do so. NCTA believes that the Commission's tentative decision to include pay-per-view services on the same basis as other services is the result of a failure on the part of the parties to this proceeding to adequately explain how pay-per-view service is offered; the following discussion should, NCTA submits, lead the Commission to reconsider its initial determination.⁵²

Specifically, there are several models for providing pay-per-view service. For example, in some cases, pay-per-view rights to movies and other events are obtained from the rightsholder (e.g., the movie studio) by an entity that schedules, markets, and distributes the programs to cable operators nationwide. In this situation, the relationship between the pay-per-view network and the cable operator is in some respects similar to that between operators and other networks. In other cases, however, the cable operator directly obtains a

⁵¹Id. at ¶ 217.

⁵²NCTA submits that the Commission also should revisit its decision not to adopt exemptions for either new or popular programming. Further Notice at ¶¶ 220-21. At least one of these two exemptions should be adopted as a further means of ensuring that the application of channel occupancy limits do not deter investment in new program offerings. See NCTA Reply Comments at 23; Turner Comments at 18.

license from the rightsholder. In these cases, what is generally thought of as the pay-per-view "network," is little more than a transmission service. Finally, in many instances, there is no "network" at all. The cable operator directly licenses with the rightsholder for programs which are then downloaded to subscribers (either from a tape machine at the system headend, or, in the future, from the stored memory of locally or regionally situated video servers). This last model more closely resembles a local origination channel than the type of program service with which the channel occupancy limits are concerned.

NCTA submits that, at very least, the Commission must distinguish the network model of pay-per-view from the transmission service and local origination models and exempt the latter two approaches from the channel occupancy limits. An even better solution is for the Commission not to attempt to distinguish the different pay-per-view models and to simply exempt all pay-per-view services from the channel occupancy limits. This approach -- which will facilitate the continued growth of pay-per-view and similar on-demand technologies -- is consistent with the Congressional mandate that the Commission's implementation of channel occupancy limits not "impair the development of diverse and high-quality video programming."⁵³ Finally, the Commission also can avoid deterring the expansion of pay-per-view services by adopting a "cap" on the number of channels to which channel occupancy limits apply, as discussed in greater detail above.⁵⁴

⁵³47 U.S.C. § 533(f)(2)(G).

⁵⁴See discussion at pages 16-17, *supra*. A ceiling on the number of channels to which the channel occupancy limits apply also will ensure that such limits do not impede the introduction of multiplexed services.

F. Effective Competition.

The Commission has proposed to eliminate channel occupancy limits in any community where there is "effective competition" as defined in the rate regulation provisions of the 1992 Cable Act, 47 U.S.C. § 543(l)(1).⁵⁵ In addition to seeking comments on this proposal, the Commission also asks commenters to discuss whether the channel occupancy limits should be automatically phased out when effective competition exists and whether the so-called "30 percent" test of effective competition should apply in the channel occupancy context.

NCTA addressed these same issues in its initial comments in this proceeding. As indicated therein, NCTA strongly agrees that the channel occupancy limits should not apply to systems that are subject to effective competition.⁵⁶ Where a system is subject to effective competition, there is no reason to fear that the flow of diverse programming to consumers will be constrained. Moreover, an exemption for systems that are subject to effective competition should apply automatically; requiring the filing and processing of individual waiver requests would be unduly burdensome and administratively wasteful for all concerned. Finally, all of the statutory tests of effective competition (including the 30 percent standard) should be considered in determining whether the channel occupancy limits

⁵⁵Further Notice at ¶ 231.

⁵⁶NCTA Comments at 34.

apply. A system with low penetration is unlikely to have the market power necessary to foreclose opportunities for unaffiliated program networks or to limit program diversity.⁵⁷

G. Enforcement.

In its initial Notice in this proceeding, the Commission proposed that local franchising authorities be given primary responsibility for monitoring compliance with the channel occupancy limits by means of a certification approach.⁵⁸ Upon consideration of the comments received in response to this proposal, the Commission wisely has concluded that it should retain enforcement responsibility with respect to the channel occupancy limits.⁵⁹ Local enforcement, as NCTA and others have pointed out, would have been administratively burdensome and rife with the potential for inconsistent decisions.⁶⁰

Unfortunately, the Commission continues to reject the concept of enforcing the channel occupancy limits on a complaint basis. NCTA strongly urges the Commission to reconsider its tentative conclusion in this regard. Complaint-based enforcement would be far less burdensome for both the Commission and cable operators. Nor is there any basis for the Commission's concerns that a complaint-based approach will not adequately protect diversity. Indeed, by limiting standing to bring complaints to unaffiliated programmers that have sought

⁵⁷While there is no justification for the Commission to exclude from consideration any of the statutory criteria for establishing the presence of effective competition, NCTA submits that there may be instances where the presence of competition not meeting the statutory standards should be deemed sufficient to exempt a system from channel occupancy limits. In particular, the channel occupancy limits should not apply to a multiple dwelling unit where a competing distributor is offering service.

⁵⁸Notice, *supra*, 8 FCC Rcd at 220-21.

⁵⁹Further Notice at ¶ 242.

⁶⁰NCTA Comments at 35.

and are being denied carriage by the system, the Commission would ensure that channel capacity is not left unused.⁶¹ As an additional incentive to promote diversity, a cable operator found to have violated the channel occupancy limits should be permitted to remedy its noncompliance not merely by deleting a service, but also by adding or replacing services.⁶²

CONCLUSION

The Further Notice clearly evidences the Commission's efforts, in formulating horizontal and vertical ownership limits, to follow the Congressional admonition that it "strike the proper balance" among various competing policy concerns and objectives. Nonetheless, in a number of instances, the Commission has reached tentative conclusions or offered proposals that are unduly restrictive and that will deny the public the well-established efficiencies and other benefits, including the development of diverse and innovative services, provided by vertical and horizontal investment in the cable industry. NCTA urges the

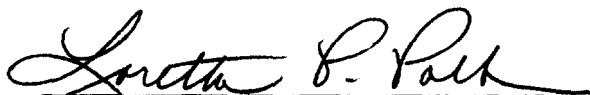
⁶¹As noted earlier, IFE has suggested that a system be permitted to exceed the channel occupancy limits where no unaffiliated programmer is seeking carriage and channel capacity would otherwise go unused. Further Notice at ¶ 184. The enforcement approach described above efficiently accomplishes the laudable goal of the IFE proposal.

⁶²Furthermore, the presence of unused leased access capacity should be deemed an affirmative defense to a complaint of noncompliance with the channel occupancy limits.

Commission to reconsider these conclusions and proposals and to adopt final rules in this proceeding consistent with the comments contained herein.

Respectfully submitted,

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